

1 HONORABLE RONALD B. LEIGHTON
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 FOREST SERVICE EMPLOYEES FOR
11 ENVIRONMENTAL ETHICS,

12 Plaintiff,

13 v.

14 UNITED STATES FOREST SERVICE,

15 Defendant.

16 CASE NO. 3:17-cv-5747-RBL

17 ORDER GRANTING DEFENDANT'S
18 MOTION FOR SUMMARY
19 JUDGMENT

20 **INTRODUCTION**

21 THIS MATTER comes before the Court on Defendant United States Forest Service's
22 Supplemental Brief in Support of Cross-Motion for Summary Judgment. Dkt. #27. The parties
23 previously filed cross motions for summary judgment, and the Court ruled in favor of the
24 Defendant on all claims except one: whether the Forest Service violated the NFMA and APA by
granting a special use permit to the Navy without considering if there were reasonable private
land alternatives. The Court stated that "the Forest Service committed an error by failing to
provide any reason for why the Navy's training could not be accommodated on private land, as
required by the Forest Plan." Dkt. #26, at 17. However, the Court went on to order additional

1 briefing on the issues of whether the Forest Service’s error was harmless and, if not, what the
2 appropriate remedy would be. *Id.*

3 **DISCUSSION**

4 With its supplemental brief, the Forest Service submitted three declarations. Two, the
5 declarations of John Mosher and Dean R. Millet, shed light on the Navy and Forest Service’s
6 process of ruling out private land. Mosher, a Navy Environmental Program Manager, states that
7 he worked with a Navy Range Team starting in 2009 to evaluate sites for the Navy’s mobile
8 emitters.¹ He explains that the team reviewed a variety of maps and mapping programs to
9 determine that private land would not be a suitable option for the mobile emitters. The reasons
10 include the small amount of private land beneath the Olympic Military Operations Areas
11 (“MOA”), its non-contiguous nature, the variety of owners, vegetation obstructions, lack of cliffs
12 and ridges near roads, and a general absence of maintained roads. Dkt. #27-1, at 5-6. Mosher
13 also states that he attended a meeting with Millet and other Forest Service personnel in
14 November 2014, at which there was a “group discussion” of the private land requirement and the
15 Navy’s analysis. *Id.* at 7-8; Dkt. #27-3, at 2.

16 Millett, a District Ranger for the Olympic National Forest, ultimately approved the
17 Navy’s special use permit application. Dkt. #27-3, at 1. In addition to attending the November
18 2014 meeting, Millet also states that he and other staff “reviewed the application and justification
19

20 _____
21 ¹ “Mobile emitters” refers to the trucks used by the Navy as part of its electronic warfare training. To quote from the
22 Court’s previous order, “In simplified terms, ‘electronic warfare’ refers to the use of electromagnetic energy to
23 disrupt or control access to the electromagnetic spectrum, which may be used for such purposes as navigation or
24 communication. To conduct training, the Navy must simulate the types of electromagnetic energy that an enemy
would generate in order to practice detecting and controlling these systems. One way that the Navy does this is
through the use of trucks hauling the necessary equipment to emit an electromagnetic signal. These trucks are
basically Ford F-350s carrying trailers with large antennae. To conduct training, the Navy drives these trucks to pre-
selected locations and energizes the emitters, after which aircraft fly overhead and try to detect the signals.” Dkt.
#26, at 2-3.

1 why other lands would not be suitable.” *Id.* at 3. In granting the permit, Millet was also “guided”
2 by his personal knowledge of the area, in which most of the industrial private land within the
3 MOA is at a lower elevation and flatter than Forest Service land, while the non-industrial
4 holdings consist of small farms or ranches that would be unsuitable for mobile emitter activities.
5 *Id.* at 4.

6 FSEEE argues that the Court may not consider these declarations because they do not
7 satisfy any of the exceptions to the general rule that courts must confine themselves to the
8 administrative record in an APA review. FSEEE also contends that the Forest Service’s
9 declarations do not really address whether the agency’s error was harmless, but whether the
10 agency erred at all. The Forest Service responds that the declarations are admissible to explain
11 the agency’s decision. It also adds that there is no Ninth Circuit authority stating that a court may
12 not consider extra-record documents to determine whether a harmless error occurred or to
13 fashion a remedy.

14 The Forest Service seems to have misconstrued the Court’s prior order. The Court did not
15 determine that the agency committed some procedural error by failing to “memorialize” its
16 reasoning. Dkt. #27, at 6. FSEEE’s claims were based on the NFMA’s substantive requirements,
17 not NEPA’s procedural ones. See *Native Ecosystems Council v. U.S. Forest Serv., an agency of*
18 *U.S. Dep’t of Agric.*, 418 F.3d 953, 958 n.4 (9th Cir. 2005). Therefore, the Court’s conclusion
19 that the record did not explain the Forest Service’s reasons for ruling out private land amounted
20 to a conclusion that the agency did not come up with reasons at all. See *California Communities*
21 *Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012) (the court’s review focuses on
22 the reasoning employed by the agency); *Native Ecosystems*, 418 F.3d at 965 n.11 (finding that
23 the Forest Service had “not ensured the project [was] in compliance with” forest plan

1 requirements because it had failed to adequately explain its reasoning in the record). This is a
2 result of APA review's epistemological limitations. Because courts cannot get inside agency
3 officials' heads, evaluating an agency's decision-making process inevitably requires identifying
4 a stand-in for the bureaucratic mind. That stand-in is generally the administrative record.

5 Consequently, supplementing the record with the Forest Service's declaration would
6 necessarily involve revisiting the merits of the decision-making process itself. Expanding the
7 universe of what went into the agency's decision by including all required considerations would
8 render any error not just harmless but nonexistent. Indeed, this is likely the reason that neither
9 party could find a Ninth Circuit case supplementing the record to decide the issue of harmless
10 error – all of the exceptions identified by the Ninth Circuit are only relevant to whether an error
11 occurred at all. *See Southwest Center*, 100 F.3d at 1450. Furthermore, allowing an agency to say
12 through retrospective declarations that its error was harmless because it would have reached the
13 same conclusion if it had done the required analysis would amount to a post-hoc rationalization.
14 *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir.
15 2012). The Ninth Circuit has rejected such attempts in the past. *Nw. Res. Info. Ctr., Inc. v. Nw.*
16 *Power & Conservation Council*, 730 F.3d 1008, 1019 (9th Cir. 2013) (rejecting the agency's
17 "post-hoc litigation position" that its error was harmless because "no amount of public
18 comment" would have led it to adopt a different methodology).

19 However, the fact that the Court cannot consider the Forest Service's declarations to
20 decide harmless error does not change the fact that the declarations exist. If they did fall within
21 one of the recognized exceptions allowing extra-record documents, the only reason for ignoring
22 them would be their untimely submission after the initial Motion for Summary Judgment.
23 Furthermore, as the Forest Service points out, these declarations may compel the conclusion that
24

1 any action the Court may require from the agency on remand would be a duplicative waste of
2 time. Faced with a choice between mandating a wasteful outcome and revisiting an earlier
3 conclusion, the latter option is clearly superior.

4 As a general rule, a court reviewing an agency action must limit itself to “scrutinizing the
5 administrative record at the time the agency made its decision.” *Asarco, Inc. v. U.S. Envtl. Prot.*
6 *Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980). However, this circuit has recognized several
7 exceptions to this rule. Extra-record materials may be considered “(1) if necessary to determine
8 ‘whether the agency has considered all relevant factors and has explained its decision,’ (2) ‘when
9 the agency has relied on documents not in the record,’ or (3) ‘when supplementing the record is
10 necessary to explain technical terms or complex subject matter.’ *Sw. Ctr. for Biological Diversity*
11 *v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (quoting *Inland Empire Pub. Lands*
12 *Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996)). These exceptions do not alter the
13 principle that “review of an administrative agency’s decision begins and ends with the reasoning
14 that the agency relied on in making that decision.” *California Communities Against*, 688 F.3d at
15 993.

16 The first exception is the only one potentially relevant here, but “this exception is so
17 broad in its formulation, courts have been reluctant to invoke it.” *Pub. Power Council v.*
18 *Johnson*, 674 F.2d 791, 794 (9th Cir. 1982). Instead, “[w]hen there is a need to supplement the
19 record to explain agency action, the preferred procedure is to remand to the agency for its
20 amplification.” *Id.* There are, nonetheless, some instances where courts have reviewed
21 “affidavits or testimony” to obtain “such additional explanation of the reasons for the agency
22 decision as may prove necessary.” *Id.*; *Camp v. Pitts*, 411 U.S. 138, 143 (1973). Where there is
23 “no substantial basis” to conclude that an agency’s explanation is “simply an after-the-fact

1 rationalization,” affidavits or other testimony may be used to show that an agency’s action was
2 not an abuse of discretion. *See San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d
3 676, 714-15 (9th Cir. 2012); *see also Midwater Trawlers Coop. v. Dep’t of Commerce*, 393 F.3d
4 994, 1008 (9th Cir. 2004) (affirming order to supplement the record with documents and
5 declarations to permit the Fisheries Service to “more fully explain . . . its adoption of the sliding
6 scale methodology”); *San Diego Navy Broadway Complex Coal. v. U.S. Coast Guard*, No.
7 10CV2565-IEG RBB, 2011 WL 1212888, at *6 (S.D. Cal. Mar. 30, 2011) (supplementing the
8 record with a declaration from the Coast Guard explaining the agency’s reasons for eliminating
9 the security zone around cruise ships).

10 Typically, when courts supplement the administrative record, they do so in response to a
11 motion from the agency or *sua sponte* after determining its necessity for effective judicial
12 review. *See, e.g., Dunn v. F.D.I.C.*, No. CV 08-06652 MMM AJWX, 2012 WL 1986042, at *7
13 (C.D. Cal. May 31, 2012) (ordering supplementation *sua sponte*); *Midwater Trawlers*, 393 F.3d
14 at 1007 (affirming district court’s granting of the agency’s motion to supplement the record).
15 Nonetheless, despite the unusual procedural posture, supplementing the record is appropriate
16 here.

17 First, as the previous order recognized, it is not possible to tell from the administrative
18 record alone whether the Forest Service had adequate reasons for deciding that private land could
19 not reasonably accommodate the Navy’s use. This means that additional explanation is the only
20 way to determine whether the agency actually considered such reasons. Second, if the Forest
21 Service did sufficiently consider private options before granting the permit, it would defeat the
22 purpose of remand. Given the Forest Service’s discretion in interpreting its own Forest Plan and
23 the Plan’s very forgiving requirement that a permit may be authorized if the special use cannot

1 “reasonably be accommodated on private land,” the agency’s task on remand would not be
2 strenuous. AR 022641. If the Forest Service has actually done this work already, it makes no
3 sense to require it again. *See Midwater Trawlers Coop. v. Dep’t of Commerce*, 393 F.3d 994,
4 1007 (9th Cir. 2004) (affirming the district court’s decision to supplement the record in lieu of
5 remand where it would be the “most reasonable and efficient use of resources” because the
6 agency had “already supplied ‘further justification for the current allocation’”). It is also worth
7 noting that FSEEE did not challenge the permit on procedural NEPA grounds, which could only
8 be corrected by performing the missing procedural requirement on remand.

9 Finally, there is not a “substantial basis” to conclude that the Forest Service’s
10 declarations amount to a mere after-the-fact rationalization. *See San Luis & Delta-Mendota*, 672
11 F.3d at 714-15. The declarations do not describe the substantive reasons why rejecting private
12 land in the abstract, but rather attest to the fact that these reasons were considered prior to
13 granting the permit. The Mosher declaration states that the Navy applied its electronic warfare
14 training criteria to the private land options within the Olympia MOA and found them
15 unreasonable. Dkt. #27-1, at 4-7. This determination was then discussed at a November 2014
16 meeting with Forest Service personnel, including Dean Millet. *Id.* at 7-8; Dkt. #27-3, at 27-3.
17 Millet also states that he reviewed the private lands requirement with other staff and approved
18 the permit partly based on his personal knowledge that private land in the Olympic MOA is
19 either low-elevation or consists of small plots that would not suit the Navy’s needs. Dkt. #27-3,
20 at 3-4.

21 The nature of these declarations also distinguish this case from *League of Wilderness*
22 *Defs./Blue Mountains Biodiversity Project v. United States Forest Serv.*, No. 3:10-CV-01397-SI,
23 2012 WL 13042847, at *3 (D. Or. Dec. 10, 2012). There, the declarations submitted by the
24

1 agency “presume[ed] that revising the cumulative impacts analysis is a formality that [would]
2 not alter [the agency’s] ultimate conclusion.” *Id.* Here, in contrast, the declarations do not make
3 presumptions but rather describe events that were missing from the administrative record.

4 After considering the record in addition to the declarations submitted by the Forest
5 Service, the Court holds that the agency did act consistently with the Plan’s requirements. The
6 Navy’s review resulted in several rational grounds for rejecting private land as unreasonable, and
7 the Navy discussed these findings with the Forest Service. This was sufficient to support the
8 Forest Service’s conclusion that the Navy’s use could not be reasonably accommodated on
9 private land.

10 FSEEE’s contention that the Navy’s map-based review process was insufficient is
11 unpersuasive. As the Court has noted several times, the Plan’s requirement to rule out private
12 land is not highly restrictive or specific, and a map-based review is not inconsistent with the
13 Plan. FSEEE’s objections that the Mosher’s conclusions with the Navy Range Team were not in
14 the record is likewise unconvincing. As the Court noted earlier, FSEEE does not challenge the
15 Forest Service’s decision on procedural grounds; indeed, if every aspect of an agency’s
16 explanation was required to be in the record there would be no purpose for the first exception
17 from *Southwest Center*, 100 F.3d at 1450 (9th Cir. 1996).

18 If the Forest Service had simply explained its reasoning in the record, much work and
19 litigation may have been avoided. However, “its failure to give full contemporaneous
20 explanations does not amount to an abuse of discretion or otherwise invalidate its actions.” *San*
21 *Luis & Delta-Mendota*, 672 F.3d at 715. To comply with the NFMA and its Forest Plan, the
22 Forest Service simply needed to show that it considered private land and had a rational basis for
23
24

1 its determination. It has now satisfied that requirement and the Court will not order remand when
2 it would be a useless exercise.

3 **CONCLUSION**

4 For these reasons, the Forest Service's Motion for Summary Judgment is GRANTED.

5 IT IS SO ORDERED.

6
7 Dated this 22nd day of January, 2019.

8
9
10 
Ronald B. Leighton

11 United States District Judge

12
13
14
15
16
17
18
19
20
21
22
23
24